

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.G., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

JEFFREY E.,

Defendant and Appellant.

E041912

(Super.Ct.No. J202223)

OPINION

APPEAL from the Superior Court of San Bernardino County. James C. McGuire,
Judge. Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and
Appellant.

Ruth E. Stringer, County Counsel, and Dawn Stafford, Deputy County Counsel,
for Plaintiff and Respondent.

Leslie A. Barry, under appointment by the Court of Appeal, for Minor.

Appellant Jeffrey E. (father) is the father of N.G. (child), who was born in March 2003. Father appeals the juvenile court's orders of October 17, 2006, denying his petition under Welfare and Institutions Code¹ section 388 and thereafter terminating his parental rights on December 4, 2006. As discussed below, we affirm the juvenile court's orders.

FACTS AND PROCEDURE

The two-year-old child was taken into protective custody in June 2005 after passersby at a public park reported that father appeared to be drunk and was slapping and shaking the child while trying to wrestle her into a stroller. Father fought with people who attempted to intervene and punched a woman in the face. Police arrested father for felony child endangerment and on a felony warrant for trying to bring marijuana into the jail during a previous arrest. Father had to be subdued at the jail when he became angry and charged a police officer who was attempting to interview him.

At the detention hearing held on June 16, 2005, father was present in custody. The juvenile court ordered the child detained.

Jurisdiction/Disposition Hearing and Reports

The social worker prepared four reports and addendums for the jurisdiction/disposition hearing, dated July 7, July 22, August 22, and November 17, 2005. The

¹ All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

reports indicate that father had an agreement with the child's mother that he would father the child, and the child's older sibling (with whom father and the mother had previously failed to reunify), while the mother continued to live with a Mr. G. Father provided support for the child in the form of shoes, milk, a stroller and diapers. The mother allowed father to see the child twice each week at a local park where he used to "spend a lot of time."

The child's mother had 17 previous child welfare referrals, mostly involving neglect. Dependency cases had been opened on six of the mother's other children, and three additional children lived with relatives. This child was the only child remaining in the mother's custody. Both father and the mother had extensive criminal histories. Father's history involves mostly disorderly conduct by being drunk in public, but also includes robbery, corporal injury upon a spouse, vandalism, and trespassing. Father's most recent arrests were on February 25 and March 4, 2005, both for being drunk in public. The police reports indicate that father was uncooperative and defiant on both occasions. Father denied drug use, but admitted to drinking alcohol since he was 18 years old. Father also stated that he was disabled from a childhood accident and was currently appealing a second denial of social security income (SSI) benefits.

Father was released from custody on August 1, 2005, and regularly attended his weekly visits with the child. The social worker noted that father brought toys to the child and read to her, and that there was a bond between them. However, between August and November of 2005, father either failed to test or tested positive for marijuana and/or alcohol five times.

The jurisdiction/disposition hearing was held on November 17, 2005, after several continuances. The juvenile court found true allegations that father suffered from alcohol abuse, had failed to supervise and protect his child from the child's mother² and had failed to reunify with the child's older sibling.³ The court found true similar allegations regarding the child's mother. The court ordered the Department of Children's Services (DCS) to provide father with reunification services and ordered father to participate in his case plan. No reunification services were offered to the child's mother. The court ordered that father receive weekly supervised visits with the child.

Six-Month Review Hearing and Reports

The social worker filed a status review report dated May 17, 2006, and an addendum on June 20, 2006. The reports noted that father remained homeless, unemployed, and continued to abuse drugs and alcohol. In addition, although father was normally polite and mild-mannered, he sometimes became hostile, rude and argumentative on the phone and at the DCS office. This lead DCS staff to conclude that he was under the influence on those occasions.

² The child's mother suffers from drug abuse. Father was not the child's custodian at the time of the detention, but visited with her regularly at the park where the child was detained. The mother was unavailable to pick up the child when father was arrested, as she had left the child with father at the park so she could seek medical treatment for a leg injury. The mother is not a party to this appeal.

³ Father's parental rights to the child's older sibling were terminated in August 2004 after father received 27 months of services.

In March 2006, father was arrested for the incident at the park the previous June, which had precipitated this dependency case. Father served about three weeks in jail and then plead no contest to willful cruelty to a child so that he could enter an inpatient substance abuse program and continue to visit the child. However, father failed to enroll in the program until May 23, 2006, after he was arrested on a warrant for failing to enter the program by May 1 as a condition of his probation. In addition, father was again arrested for being drunk in public on April 3, 2006, after having been released from jail on March 20.

At the six-month review hearing (§ 366.21, subd. (e)) held on June 20, 2006, the court found that father had made minimal progress in his case plan and that there was not a substantial probability that the child could be placed in his custody within the statutory time frame. The court terminated reunification services and set the case for a section 366.26 hearing to determine a permanent plan for the child.

Section 388 Petition

On August 17, 2006, father filed a section 388 petition for modification, requesting that reunification services be extended for six months. On the portion of the petition where he was to state what had changed since the court's June 20 decision to terminate reunification services, father explained that he had entered the inpatient substance abuse treatment program and was set to graduate on August 22, 2006. He attached certificates for parenting and anger management classes that were a component of his case plan. Father explained that he was seeing a therapist and taking antidepressants, as he had received a dual diagnosis of mental illness and substance

abuse. He also explained, and attached a supporting letter from the inpatient treatment center, that they were working on extending his stay for 30 days and transitioning him to a sober living home.

In answer to the petition's question as to why extending reunification services would be better for the child, father stated that the child knows him as her father, is happy to see him at each visit, and that they are "developing a good parent-child bond." Father also argued that, because the child was young and not yet in a concurrent planning home, her needs would best be met by giving him more time to reunify.

DCS opposed the section 388 petition in an interim review report filed September 5, 2006. DCS argued that the changes father had described were not "significant enough" and did not establish a strong possibility that six more months of services would enable father to gain custody of the child. DCS stated that father had a long history of homelessness, unemployment, and substance abuse, as well as many arrests related to substance abuse, but had been sober for only 90 days, lived in a homeless shelter, and was still unemployed. DCS reported that father had completed the 90-day inpatient program on August 22, 2006, and was now living in a homeless shelter where residence is on a day-by-day basis and can be terminated if father fails to submit three job applications each day. DCS also argued that father had waited nearly one year into the dependency to seek help for his substance abuse problems, and only after being arrested for not doing so as a condition of probation. Finally, DCS reported that the child had recently been placed with a prospective adoptive parent and was adjusting well.

At a hearing held on October 17, 2006, the juvenile court declined to set a hearing on the section 388 petition. The court found that circumstances had not sufficiently changed and that they would not change within the statutory time frame of 18 months from the date the child was removed from the parents' custody, i.e., December 12, 2006. (§ 366.22.) The court then denied the petition.

Section 366.26 Hearing

The section 366.26 hearing to determine a permanent plan for the child was held on December 4, 2006. The court heard testimony from father and the social worker and reviewed the adoption assessment and section 366.26 report, both dated October 17, 2006. The child's counsel recommended adoption, with a preference for an open adoption with the prospective adoptive parent so the child could maintain a relationship with her father. The juvenile court ordered adoption as the permanent plan and terminated father's parental rights. The court also terminated father's visitation after making a finding of detriment based on the evidence presented of the recent negative effects of the visits on the child. This appeal followed.

DISCUSSION

1. Summary Denial of Father's Section 388 Petition

Father first contends the juvenile court erred when it summarily denied his section 388 petition for modification without a hearing. We review the court's decision for abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

"The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to

the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.]" (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.) The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would support a favorable decision on the petition. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Here, the petition and supporting documents alleged that father had completed a 90-day residential substance abuse treatment program, had completed the parenting and anger management components of his case plan, was seeing a therapist and taking medication for his mental health issues, and was "seeking out any available similar opportunities to have housing." However, the juvenile court could have reasonably concluded that the petition alleged "changing" rather than "changed" circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) Father's claimed accomplishments were recent and not well established. For example, father, at the age of 42, had a years-long history of arrests for public drunkenness, and had been arrested for public drunkenness as recently as April 3, 2006. The 90 days of sobriety, plus the additional two months since he completed the 90-day program, were not enough to show that his circumstances were indeed "changed." Father had received alcohol abuse services in connection with the dependency of the child's older brother, but continued to drink

heavily. “[R]elapses are all too common for a recovering drug user. ‘It is the nature of addiction that one must be “clean” for a much longer period . . . to show real reform.’ [Citation.]” (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [200 days], quoting *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [120 days].)

In addition, as of the date the juvenile court denied father’s request to hold a hearing on the section 388 petition, father was living in a halfway house for parolees, and was the house manager. Thus, father did not have a place for the minor to live with him, or a job unconnected with his living arrangements among parolees, and had no foreseeable prospects for either housing or employment. In sum, then, the juvenile court did not abuse its discretion when it concluded that father did not make a prima facie showing of changed circumstances that would merit a hearing on his section 388 petition.

2. Parental Bond Exception

Father argues that the juvenile court erred when it failed to apply the parental bond exception to the preference for adoption.

A. Introduction and Standard of Review

At a hearing held pursuant to section 366.26 to select and implement a permanent plan for a child whose parent has failed to reunify, the juvenile court must first determine whether the child is likely to be adopted. (§ 366.26, subd. (c)(1).) Once the juvenile court has made the finding of adoptability, “the court shall terminate parental rights and order the child placed for adoption,” unless it also determines that this would be detrimental to the child under one or more of the six circumstances set forth in section 366.26, subdivision (c)(1)(A) through (c)(1)(F). In cases where the parent has failed to

reunify with the child and the juvenile court has found the minor to be adoptable, the burden then shifts to the parent to establish that one or more of these exceptional circumstances exists. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) The appellate court must affirm the trial court's conclusion that none of these exceptional circumstances is present if the ruling is supported by substantial evidence. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Section 366.26, subdivision (c)(1)(A), provides that the parental bond exception applies where “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

The record clearly shows that father visited the child regularly. However, father was also required to establish that the child would benefit from continuing the father-child relationship. The courts have clarified this exception “to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . . If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The courts have also clarified that even “frequent and loving” contact between parent and child is not enough to establish that the child would “benefit from a continuing relationship” as required by statute, where the parent does not occupy a “parental role” in the child's life. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) “Interaction between natural parent and child will always

confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Here, there is substantial evidence on the record to support the juvenile court’s finding that the benefit the child would derive from a continuing relationship with father does not outweigh the benefit to her of being adopted. First, although father and the child visited regularly, father was never able to progress beyond supervised visitation. Second, the child was not in father’s custody when she was detained. Rather, as father described the situation, the child’s mother had allowed him to visit with the child twice each week for six hours, apparently at the park where he would “spend a lot of time.” Third, the social worker testified that the three-year-old child had bonded easily with her prospective adoptive parent and, although she called father “Daddy,” she also called the prospective adoptive parent “Mommy.” Fourth, the visits recently had not been as positive for both father and the child as they had previously been. Father had recently begun to make inappropriate comments to the child during visits, such as “[T]hey’re taking you from me. Look me up when you’re grown up.” The social worker also testified that the child was beginning to have temper tantrums during visits with her father, and that he once responded by saying “I hope the lady you live with doesn’t beat you for that kind of behavior.” In addition, father chose to terminate several of the visits early when the child began to misbehave, rather than dealing with the causes of the tantrums and redirecting her behavior. Thus, it appears that the benefit that the child was

receiving from continued contact with father was diminishing, while the record reflects that she was adjusting well to her prospective adoptive home.

To conclude, the record does not indicate that father occupies a “parental role” in the child’s life, nor that the child has a “substantial, positive emotional attachment” to father, such that the benefits of the parental relationship outweigh the benefits to the child of being adopted into a stable and loving home.

DISPOSITION

The juvenile court’s orders are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.